

after that decision, we have the British Columbia Supreme Court's decision concerning the Assessor's appeal by way of stated case. Ten questions had been posed to the Court, and Madam Justice Gerow answered all of them negatively. I will deal with each in turn but, before getting to the specifics, there was the question of the standard of review to be applied.

As a result of the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, there are only two standards of review: correctness and reasonableness. The Assessor took the position that the former would be the applicable standard as the questions posed were "questions of law" and the Board was not entitled to deference. The Hotel argued for a reasonableness standard as the questions were not "questions of law" but were "fact and evidence intensive." Having reviewed the pertinent law, Gerow, J. stated:

[20] I have concluded that the questions are factual in nature as that they are questions of fact, discretion and policy.

The Assessor had also contended for a correctness standard because of "...the importance of the questions to the legal system at large and as an issue of general law", but the learned judge dismissed this argument as "...it is clear from the Board's reasons that the assessment of the Four Seasons is unique and has limited precedential value." The standard of review to be applied would accordingly be that of reasonableness.

Question 1: Did the Board err in law when it held, contrary to the evidence, that the appraisers for both the Appellant and Respondent applied a three percent (3%) management fee as an expense when stabilizing the net operating income of the property under appeal?

In fact, both expert witnesses, in their respective reports, had referred to a management fee of 3,0%. They had also both referred to an additional "incentive fee." The Assessor was essentially arguing that these two fees should be added together to constitute the management fee. The learned judge considered this to be an issue of fact, not of law, and she concluded:

[31] ...It is difficult to see how the Board utilizing the 3% management fee is an

ASSESSOR AREA #09 V. FOUR SEASONS HOTEL LIMITED (2009 BCSC 251)

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It seems scarcely any time at all since I reported on the Property Assessment Appeal Board's "... long awaited decision concerning the assessment of the Four Seasons Hotel in Vancouver for the years 1999/2005." Now, less than nine months

error of law as defined by the case law. There was clearly evidence before the Board that the management fee was 3%....

[33] In my view, it cannot be said that it was unreasonable for the Board to have determined that a 3% management fee should be utilized.

Question 2: Did the Board err in law when, in analyzing sales for the purpose of determining a market derived capitalization rate in order to value the property under appeal, it applied an "industry standard" management expense of three percent (3%) as opposed to the "actual" management expense applicable to the property under appeal, when both the Appellant's and the Respondent's appraiser, when stabilizing the net operating income of property under analysis for the purpose of valuing the subject property, used a stabilized actual management fee applicable to this property?

It will be recalled that the Board had relied on two sales in deriving a capitalization rate: the Westin Bayshore and the Pan Pacific, but principally on the former. The Assessor argued that the Board was wrong to use a 3% management fee for the Westin Bayshore, and that this was nothing more than "an arbitrary industry standard". However, the learned judge determined that an appraisal report had been tendered in evidence that reflected base management fees for the Westin Bayshore typically ranging between 2.0% and 4.0% of total revenue. Moreover, one of the Assessor's own expert witnesses had referred to "typical deductions" including 3% management fees. She accordingly concluded:

[39] It is apparent that there was evidence before the Board regarding the management fee of the Westin Bayshore and appraisal practice generally. In my view, it cannot say that it was unreasonable for the Board to deal with management fees in the manner it did.

Question 3: Did the Board err in law when it used one year's trailing income as the income stream for the purpose of analyzing and determining a capitalization rate from comparable sales when the formulization agreed upon and used by both appraisers for the purpose of determining a stabilized income for the property under appeal was "a

stabilized one year's maintainable income stream based on 'trailing years' (more than one years) income...?"

The most salient point affecting this question was that the three experts opining on the determination of NOI for comparable properties had each used a different appraisal approach. The Assessor now appeared to be arguing that the approach favoured by its expert whose evidence had been rejected by the Board should be substituted for that of its expert whose evidence had been accepted by the Board. Having cited the Board's careful comparison of the respective merits of the conflicting approaches from the Assessor's experts, Madam Justice Gerow was readily able to conclude:

[45] The appellant has failed to satisfy me that the Board either acted unreasonably in analysing and determining the capitalization rate from comparable properties or acted in the absence of any evidence, or made a determination that was not available to it on the evidence.

Question 4: Did the Board err in law when it found that a number of sales of comparable properties to the REITs and a sale of a majority interest of a comparable property were non-arm's length sales?

Question 5: Did the Board err in law when it did not take into account and rejected as inappropriate for use as comparable sales for analysis to determine a capitalization rate, a number of sales to a REIT and the sale of a majority interest of a property because they had no "market exposure" and were "non-arms length sales"?

These two questions were lumped together, both at the hearing and in the judgment. They received comparatively short shrift from the learned judge. Having noted the Board's conclusion that it could not rely on the Fairmont transactions because they were between related parties and the properties were not exposed to the market, she concluded:

[50] It is apparent that there was evidence before the Board on which it could make a finding of fact regarding a relationship between the purchasers and vendors involved in the transactions of all

of the Fairmont hotels. In my view, it cannot be said it was unreasonable for the Board to conclude that the Fairmont transactions were not appropriate comparables to use in the circumstances, or that the method of assessment it adopted was wrong in principle.

Question 6: Did the Board err in law and act without evidence when, after having concluded that the value of certain categories of furniture, fixtures and equipment (FF&E) belonging to the property under appeal that had been expensed by the appellant in the year of purchase should not be deducted from the "going concern value" of the property under appeal, it deducted only a portion of the value of such categories of FF&E because although these items were expensed, "these items had a longer expected life"?

It was the Assessor's position that the Board should have deducted from the going concern value all of the FF&E that had been expensed; to do otherwise would lead to "double counting". In fact, the Board had decided to deduct only some of the expensed items from the FF&E. The learned judge noted that the Board had heard "... extensive evidence as to what should and should not be included in the FF&E ...", concluding:

[56] Although the appellant argues that all expensed items should have been excluded, it is apparent from the reasons that the Board heard extensive evidence concerning which expensed items should not be included in the FF&E and determined which expensed items should be excluded.

Question 7: Did the Board err in law when contrary to all of the evidence and established valuation principles it proceeded to utilize the "reproduction costs" of the FF&E of the property under appeal for the purpose of determining the value of the FF&E that should be deducted from the "going concern" value of the subject property?

The Assessor contended that the Board had used reproduction costs, rather than replacement costs, as a result of accepting the figures of Steve Elias of Altus Helyar as a starting point for its analysis of the FF&E's RCN. The Board had sought to determine the contributory value of the

FF&E, but had rejected all of the experts' opinions on how that should be done. Nonetheless, it did find that Mr. Elias's "...specific costing helps us to understand both the quality and quantity of the FF&E in an upper-tier hotel such as the subject." So the Board had not in fact adopted Mr. Elias's costing, but did use it "...as an estimate of contributory value and as an indicator of the economic figure to replace FF&E of a similar quantity and quality in a comparable hotel". Madam Justice Gerow summed up:

[65] The appellant has failed to satisfy me that the Board acted unreasonably in analysing and determining the RCN of the FF&E in this manner, or made a determination that was not available to it on the evidence.

Question 8: Did the Board err in law when, contrary to the evidence and established valuation principles, it concluded that the property under appeal and the FF&E which belonged to the property under appeal was not suffering from "external" or "economic" obsolescence and therefore no "write-down" factor or other recognition of external (economic) obsolescence should be applied to the FF&E in place?

Question 9: Did the Board err in law, when contrary to established appraisal principles, it found that the "going concern" and the property of the going concern were not suffering from economic obsolescence, when all the evidence established that the value of the "going concern" and hence the property of the "going concern" had decreased due to causes external to the property?

Question 10: Did the Board err in law when, contrary to established appraisal principles and the evidence, it found that a reduction in value of the "going concern" from external causes not attributable to any specific asset of the "going concern" should not be applied pro rata among the assets of the "going concern," namely land, building and FF&E?

These questions were dealt with together. They were primarily concerned with the issue of whether a "write down factor" should be applied to the FF&E value if there were economic obsolescence affecting the Hotel. This issue had consumed a great deal of time at the Board

hearing, and the learned judge was meticulous in demonstrating the Board's detailed justification for dismissing the "write-down" claim advanced by Reuben Danakody, the Assessor's expert:

[73] The Board did not accept that there should be a further write down for economic obsolescence for a number of reasons, including:

- there was no evidence before them that the hotel or FF&E within the hotel are becoming or had become economically obsolete; • the economic events that affected the hotel and the hotel industry were temporary in nature;
- Mr. Danakody had only applied economic obsolescence to the FF&E and not to the land or improvements; • Mr. Danakody did not provide support for his method of calculating economic obsolescence;
- Mr. Danakody did not rely on any of the accepted methods of measuring external obsolescence; and
- There was no evidence that the cost figure put forward by Mr. Danakody of 13% for new hotels in the United States is indicative of the contributory value of the FF&E as it relates to a going concern.

As a result the Board concluded that a write down factor should not be applied.

Given all of this, the learned judge's conclusion was hardly surprising:

[74] ...There was ample evidence, including expert opinion, before the Board on which it based its decision that a write down factor was not appropriate in the circumstances of this case.

So, as said at the outset, the Assessor's questions were all answered negatively with costs being awarded to Four Seasons Hotel Limited. Finally, although I have attempted to distill the BCSC decision and to comment objectively, I would again recommend the reader to read the entire decision rather than relying on this necessarily abbreviated view.

